

Direct Appeal

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1. Familiarity with Rules of Appellate Procedure

The Defender should be familiar with all applicable rules of appellate procedure, including all Supreme Court and local appellate court rules.

2. Check Timeliness of Notice of Appeal

Within ten days of assignment to the case, the Defender should determine if the Notice of Appeal was timely filed.

The Defender should review the date of final judgment and determine whether the Notice of Appeal was filed within the time limit required by Supreme Court rules.

If the Notice of Appeal was not timely filed, the Defender should immediately file a motion for late Notice of Appeal under Rule 30.03 with the appellate court.

When the appellate court grants leave to file late notice of appeal, the Defender should immediately file a timely Notice of Appeal in the circuit court.

3. Check for Required Supplements

Within ten days of assignment to the case, the Defender should ensure that all supplements required by the appellate court to the Notice of Appeal, if any, have been filed. The Defender should take immediate steps to file any required supplements that were not previously filed.

4. Calendar Dates for Appeal

Upon assignment to the case, the Defender should determine all relevant due dates for the case in accord with Supreme Court rules, and should implement a system to ensure that such dates are followed.

5. Entry of Appearance

Within ten days of assignment to the case, the Defender should enter an appearance in the appellate court and a limited entry in all lower courts which may be necessary for preparation of the electronic legal file

The Defender should also simultaneously file a motion to withdraw any prior attorney in the appellate court, if necessary.

6. Legal File – Ordering – Confirming Documents Are Received -- Preparing – Filing With Court

Ordering Legal File

a. Within 30 days of the filing of Notice of Appeal the Defender should check the circuit clerk file to see if additional documents necessary for the preparation of the electronic legal file should be scanned. If additional documents are needed to be scanned, those should be requested.

The Defender should prepare the electronic legal file for filing with the Court of Appeals at any time prior to its due date. Early preparation will assist in making sure the complete record on appeal is timely filed. All the Courts of Appeals accept the legal file before the transcript, as it is the transcript which starts the clock running for the brief due date. Be aware that, in a legal file only case, the clock begins to run with the filing of the legal file.

The electronic legal file should include, but not be limited to, the following:

- 1) All court docket sheets, including those from the originating county if there was a change of venue.
- 2) The final indictment, or information, and any relevant prior charging documents.
- 3) Defendant's arraignment or waiver.
- 4) All relevant motions and orders.
- 5) Any written motions for judgment of acquittal.
- 6) All instructions given at trial, and any instructions offered by defendant but refused by the court.
- 7) Any written communications between the jury and court during deliberations.
- 8) The verdicts.
- 9) Any motion for new trial, or other after trial motions, and the court's rulings thereon.
- 10) The judgment and sentence.
- 11) The Notice of Appeal.

- 12) All relevant *pro se* filings by the client, if any.
- 13) Documents filed before or in connection with any mistrial in the case, which may be relevant to the direct appeal. For example, a motion to suppress may have been filed and litigated before a mistrial, but not re-filed or re-litigated before a second trial.

7. Transcripts – Ordering – Mistrial Transcripts – Confirming Transcripts Are Received -- Sending to Client – Filing With Court

Ordering the Transcript

- a. Within 30 days of filing the Notice of Appeal (or such other time as Supreme Court rules may require), the Defender should request, in writing, the complete transcript from the court reporter.

A copy of the letter requesting the complete transcript should be electronically filed with the appellate court.

The complete transcript should be requested because the appellate Defender should be familiar with all matters that occurred in circuit court in order to identify issues, evaluate the motion for new trial, and support claims on appeal. The complete transcript is also necessary for future litigation, such as postconviction.

Before requesting the transcript, the Defender should review Case.net entries of the circuit court case to identify and list all proceedings of record, for which transcripts should be requested.

The request for a complete transcript should include, but not be limited to, the following:

- 1) All pretrial matters and appearances on the record.
- 2) Any appearances or hearings related to defendant's motions to suppress, motions in limine, and other pretrial motions.
- 3) Voir Dire, including all strikes by the State and defendant, and all court rulings thereon.
- 4) Opening statements.
- 5) The complete evidentiary phase of trial, including all matters placed on the record whether within or outside the jury's hearing.
- 6) Closing arguments.

- 7) Proceedings on the new trial motion.
- 8) Sentencing.

Mistrial Transcripts

b. Where a mistrial occurred in circuit court, the Defender should request relevant portions of mistrial transcripts for use on direct appeal, or in future litigation, such as postconviction.

Mistrial transcripts may be relevant to the direct appeal. For example, a motion to suppress may have been filed and litigated before a mistrial, but not re-filed or re-litigated before a second trial. The mistrial transcript may also be relevant for direct appeal or future litigation to prove that witnesses changed their testimony, or to prove certain rulings by the trial court.

The Defender may consult the trial attorney or client to determine what relevant portions of the mistrial should be requested at the time of the direct appeal, but should err on the side of over-requesting transcripts to prepare for future litigation.

Because the time limits for investigation of postconviction actions are short, requesting mistrial transcripts during the direct appeal ensures that transcripts will timely be available for postconviction.

Confirming Transcripts Are Received

c. Upon receipt of transcripts from the court reporter, the Defender should review the transcripts to determine if any requested transcripts were not included.

The Defender should promptly request that the court reporter prepare and send transcripts that were not included.

A copy of the letter requesting the complete transcript should be electronically filed with the appellate court.

Sending Transcript to Client

- d. The Defender should send copies of transcripts to the client. The Defender need not wait until the due date for the record on appeal to send transcripts to the client.

Filing With Court

- e. The Defender should file transcripts with the appellate court within the time required by Supreme Court rules and in conformity with such rules.

The Defender may determine what transcripts may be necessary and relevant to file with the appellate court. For example, after obtaining the mistrial transcript, the Defender may determine that it is not relevant to the direct appeal, and may decline to file it. However, the Defender should retain such transcript for use in future litigation, such as postconviction.

8. Engagement Letter for Direct Appeal

- a. Within ten days of receiving an assignment to a case, the Defender should send an initial engagement letter to the client fully explaining the appellate process.

- b. The initial client letter should:

- 1) Have an overall friendly and inviting tone.
- 2) Introduce the attorney and provide contact information for the attorney.
- 3) Explain the general appellate process, either in the letter or in an accompanying appellate brochure.
- 4) Advise the client of due dates in cases, where known at time of engagement letter.
- 5) Include MSPD-required documents regarding application for services, fees, conflict inquiry, authorization for release of personal information, and citizenship inquiry.
- 6) Advise client not to discuss the case with third parties, especially the prosecutor, court and cellmates. Explain that phone calls, texts, emails and letters to third parties are read and recorded by the institutions and will be given to the State.

9. In-Person vs. Telephone Contacts – Considerations

In any discussions with clients, in-person contacts are preferred. At least one in-person or video visit should be conducted.

If conducting a telephone interview, the Defender should be aware that telephone conversations may not be entirely confidential, and that clients may be reluctant to disclose highly confidential or highly personal information over the phone.

The Defender should conduct an in-person visit where necessary to obtain highly confidential or highly personal information.

Other forms of communication may not be confidential and should be utilized with caution.

11. Initial Client Interview

Within 30 days of receiving assignment to a case, the Defender should conduct an in-person or telephone initial client interview.

The Defender should discuss in the initial interview the following:

- 1) The purpose of a direct appeal.
- 2) The general appellate process and deadlines.
- 3) The client's goals for the case, and the possibility of achieving those goals.
- 4) The possible outcomes of the case.
- 5) Questions the client may have.
- 6) Whether there are family members or other persons whom the client authorizes the Defender to speak with about the case.
- 7) That the client should inform the Defender of any change of address or contact information.
- 8) That the client should not discuss the case with third parties, including cellmates. Explain that phone calls, texts, emails and letters to third parties are read and recorded by the institutions and will be given to the State.
- 9) The possibility of an appeal bond.

12. Appeal Bond

If eligible and if the client requests an appeal bond, the Defender should obtain information from the client necessary to move for an appeal bond, and should move for an appeal bond in the trial court. Such information may include, but not be limited to:

- 1) The nature and circumstances of the offense.
- 2) Defendant's family ties.
- 3) Defendant's employment.
- 4) Defendant's financial resources.
- 5) Defendant's character.
- 6) Defendant's mental condition.
- 7) Defendant's length of residence in the community.
- 8) Defendant's record of convictions.
- 9) Defendant's record of appearance at court proceedings

while previously on bond, or failure to appear.

In discussing whether to seek an appeal bond, the Defender may realistically advise the client about the prospects of whether the client could post a bond that might be set, whether posting of a bond would disqualify a client from MSPD representation, and that time spent on bond will not count toward time served.

Even though the prospects for posting a bond may be slim, the Defender should move for an appeal bond if the client so requests.

13. Consult Trial Attorney

The Defender should consult with the trial attorney regarding any and all aspects of the case.

14. Exhibits for Appeal

The Defender should request, in writing, that the State timely provide all necessary exhibits.

The Defender should timely file all necessary exhibits with the appellate court in compliance with Supreme Court or local rules, or ensure that the State timely files such exhibits.

The Defender should review all necessary exhibits before filing an opening brief.

15. Record On Appeal -- Timely Filing -- Extensions of Time for Filing Where Record Incomplete – Notification to Client

Timely Filing of Record on Appeal

a. The Defender should file the record on appeal (legal file and transcripts) within the time required by Supreme Court rules (90 days from the notice of appeal if there is a transcript and 30 days if there is not), and in conformity with Rules 30.04 and 81.19.

The Defender should send a copy of the record on appeal to the client at the time of filing, if the legal file or transcripts were not previously sent to the client.

Extensions of Time for Filing

b. In the event that a complete legal file or transcript is not available within the time for filing the record on appeal, the Defender should file a motion with the appellate court to extend the due date.

If any legal file documents are not scanned into the Circuit Court file by the record due date, the Defender should file a motion with the appellate court to extend the due date of the record, and attach a copy of a new letter to the circuit clerk requesting the missing documents.

If the transcript is not completed by the record due date, the Defender should obtain an affidavit from the court reporter setting out that the transcript is not completed and when the reporter anticipates that it will be completed. The Defender should file a motion to extend the due date of the record with the appellate court, and attach the reporter's affidavit to the motion.

An untimely filed record on appeal must be accompanied by a separately filed motion to file out of time.

Notification to Client

- c. The Defender should notify the client any time the Defender extends the time to file the record on appeal.

16. Supplemental Legal Files or Transcripts

If at any time during the appeal, the Defender discovers that necessary documents or transcripts are missing from the record on appeal, the Defender should file a motion to supplement the record on appeal with a supplemental legal file or transcript with the missing documents or transcripts. The Defender should check local Rules.

The Defender should send a copy of the supplemental legal file or transcript to the client when it is filed.

17. Trial File

Prior to filing an opening brief, the Defender should consider requesting the trial file from the trial attorney.

18. Briefs – Time for Filing – Extensions of Time for Filing -- No More Than Two Extensions for Opening Briefs, One for Reply Briefs

Time for Filing

- a. The Defender should seek to file all briefs within the time provided by Supreme Court rules.

Extensions of Time

- b. The Defender should have reasonable, articulable grounds for an extension of time to file a brief. The Defender should not seek extensions of time as a matter of routine, or automatically in every case.

*No More Than Two Extensions for Opening Briefs,
One Extension for Reply Briefs*

The Defender should seek no more than two extensions of time to file an opening brief. There may be reasons other than press of business to request further extensions. The Defender should check Local Rules or practice.

The Defender should seek no more than one extension of time to file a reply brief.

19. Opening Brief -- Preparation – Selecting Issues for Appeal – Discussion With Client – Review by Second Attorney – Sending to Client

- a. The Defender's opening brief should comply with all Supreme Court and local rules.

The opening brief's appendix should include all documents required by Supreme Court or local rule, and all additional documents which will assist the court in rendering a decision favorable to the client.

Preparation for the Brief

- b. In preparing to write the opening brief, the Defender should review all materials constituting the record on appeal, including all legal file documents, transcripts and exhibits.

Selecting Issues for Appeal

- c. Where the client is the appellant, the motion for new trial should be a starting point for identifying the issues that will be raised on appeal.

The Defender should thoroughly research all claims in the new trial motion, as well as identify and research all potential plain error claims, before selecting or rejecting the issues to appeal.

When the Defender rejects issues to appeal, the Defender should be able to articulate reasonable grounds for doing so.

In researching issues for appeal, the Defender should:

- 1) Consider all issues raised in the new trial motion.

- 2) Compare the charging documents with the applicable statutes and MACH-CR.
- 3) Review all pretrial motions and hearings and the issues raised by such motions and hearings.
- 4) Consider whether jurors who should have been struck for cause were, in fact, removed from the jury panel that served and rendered the verdict.
- 5) Consider potential jurors whom the State peremptorily struck and whether such strikes establish a claim to be brought under *Batson v. Kentucky*, 476 U.S. 79 (1986).
- 6) Review all trial court rulings on the admissibility or inadmissibility of evidence.
- 7) Review instructions to determine whether they comply with statutory and MAI requirements.
- 8) Review all counts to confirm that the state presented sufficient evidence as to all elements for each count.
- 9) Review closing arguments for improper arguments by the State or improper limitations on defense closing argument.
- 10) Review all jury questions posed to the court, and the court's response.
- 11) Review all trial court statements for any suggestion of trial court bias.
- 12) Review whether the length of sentence imposed is uniformly consistent across the verdict forms, oral pronouncements of sentence, and the written judgment and sentence form.
- 13) Where the defendant was sentenced as a repeat offender, subject to enhanced punishment provisions, review whether such status was legally correct and properly proven and established.
- 14) Consider any and all facets of the case that could support claims of plain error constituting manifest injustice.

This above list is intended as a guide to identifying issues for appeal, but is not intended to identify all potential issues that may be raised on appeal.

Discussion With Client

d. Before filing the opening brief, the Defender should discuss with the client, in person or by telephone, the issues that the Defender will raise in the brief.

The Defender should seek and consider the client's input in selecting issues for appeal, although the Defender may ultimately select the issues.

Where the Defender and client disagree on issues that will be raised on appeal, the Defender should seek to advise the client as to the appropriateness of issues in dispute. The Defender should, to the greatest extent possible, seek to resolve such disputes in a fashion favorable to and agreeable with the client.

Where the Defender ultimately does not raise issues on appeal which the client wanted raised, the Defender should be prepared to provide the client with a written explanation for why the Defender rejected such issues. The Defender should provide reasonable, specific, articulable grounds for rejecting each issue.

Review by Second Attorney

- e. Before a brief is filed with the appellate court, the Defender should have a second attorney in the office edit the brief.

Sending to Client

- f. The Defender should send a copy of the brief to the client when it is filed with the appellate court.

20. Reply Briefs – Presumption in Favor – Preparation and Review by Second Attorney – Waiver – Sending to Client

Presumption in Favor

- a. Reply briefs are preferred and usually in the client's best interest. There is a presumption that the Defender should file a reply brief in the case.

Preparation and Review by Second Attorney

- b. In preparing to file a reply brief, the Defender should thoroughly review the State's brief, and thoroughly research the record citations and law cited by State.

The Defender should file a reply brief that rebuts arguments made by the State, corrects erroneous record or legal citations by the State, and addresses issues raised by the State but not covered in the opening brief.

The reply brief should comply with all Supreme Court or local rules.

Before the reply brief is filed with the appellate court, the Defender should consider having a second attorney in the office edit the brief.

Sending to Client

d. The Defender should send a copy of the reply brief to the client when it is filed with the appellate court.

21. Oral Argument -- Presumption in Favor -- Preparation for Oral Argument – Conduct of and Follow-up to Argument --Waiver of Argument

Presumption in Favor

a. A case should be orally argued if it will assist the client's case to do so.

Preparation for Argument

b. The Defender should prepare for oral argument by participating in a moot court.

Through the moot court, pre-argument discussion and preparation, the Defender should develop a concise theory or theme for argument, anticipate and be prepared to answer questions, identify strengths and weaknesses in the case, and prepare to rebut the State's argument.

The Defender should inform the client of the date of oral argument, and that the client's family or friends may attend the argument.

After the argument, the Defender should promptly notify the client of what occurred at oral argument.

Letter Briefs

c. Where appropriate or requested by the Court, the Defender may follow-up oral argument with a letter to the Clerk of the Court to address matters that may have arisen during oral argument, but for which the Defender did not have an immediate answer.

Waiver of Argument

d. The Defender should promptly notify opposing counsel and the appellate court, where necessary, when a Defender decides to waive oral argument. The Defender should also consider Local Rules.

22. Dismissal Dockets

The Defender should never allow a case to be placed on a dismissal docket by an appellate court. Having a case on a dismissal docket endangers the client's right to seek appellate review.

The Defender should timely file all records and briefs to ensure that a case is never placed on a dismissal docket.

Where necessary, the Defender should timely seek extensions of time from the appellate court for filing records and briefs to ensure that a case is never placed on a dismissal docket.

23. Post-Opinion Motions for Rehearing and Transfer

When the Defender receives an adverse decision from the Court of Appeals, the opinion should be promptly reviewed for whether a post-opinion rehearing or transfer motion should be filed with the Court of Appeals. If that is denied, the Defender should consider whether a transfer motion should be filed with the Supreme Court of Missouri.

The adverse decision should be sent to the client within two days and the client advised as to the Defender's intentions as to whether post-opinion motions will be filed. The short time limit is so that the client has sufficient time to file *pro se* rehearing and transfer motions if the Defender does not intend to do so. The Defender may need to withdraw from the Court of Appeals in order for the Court to accept the *pro se* filings.

A motion for rehearing and transfer should be filed when the reviewing court has overlooked or misinterpreted material matters of law or fact or when there is an issue of general interest or importance. A motion for rehearing and transfer should be filed within 15 days of the court issuing its opinion. Rules 83.02; 84.17(b). Extensions of time are rarely granted and should not be sought absent emergency circumstances.

Where the Court of Appeals has denied a motion for rehearing and transfer, the Defender should file an application for transfer with the Supreme Court of Missouri where the case presents a question of general interest or importance or the case calls for re-examining existing law or the Court of Appeals' decision is contrary to a previous decision of an appellate court of this state. Rules 83.02 and 83.04. Under Rule 83.04, the application for transfer to the Supreme Court of Missouri is required to be filed within 15 days of the Court of Appeals' order denying rehearing and transfer. An application for transfer should comply with Rule 83.05, which governs the form and content for transfer applications to the Supreme Court of Missouri. Extensions of time are rarely granted and should not be sought absent emergency circumstances. Rule 83.04.

If the Defender files for rehearing and transfer in the Court of Appeals but does not file a transfer application to the Supreme Court of Missouri, the denial should be sent to the client within two days and the client advised that the Defender does not intend to file a transfer application. The short time limit is so that the client has sufficient time to file a *pro se* transfer motion if the Defender does not intend to do so.

24. Notification to Client of Post-Appeal Remedies

The Defender should advise clients of their post-appeal remedies. Clients should be advised of their right to proceed under Rule 29.15 and the time limit for filing that *pro se* motion. Clients should be furnished a Form 40. For those clients who wish to file a 29.15 case, reasonable guidance and assistance appropriate to the clients' circumstances should be provided when requested.

In addition to advising clients of their 29.15 rights, the Defender should advise them of their right to proceed with a federal habeas corpus case without filing a 29.15 case. Clients should be advised of the time limit for

bringing a federal habeas case where they choose not to file a 29.15 case. However, the Defender should strongly encourage the client to pursue a 29.15 before pursuing federal habeas. Pursuing federal habeas without first pursuing a 29.15 creates a procedural bar to pursuing any claim of ineffective assistance that could have been raised in a 29.15.